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No. 91-1135

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NEWARK MORNING LEDGER COMPANY,
as successor to The Herald Company,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMERICAN BUSINESS PRESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT A. SALTZSTEIN
Counsel of Record
STEPHEN M. FELDMAN
DAVID R. STRAUS
SPIEGEL & MCDIARMID
1350 New York Avenue
Suite 1100
Washington, D.C. 20005-4798
(202) 879-4000
Counsel for American Business Press

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INTEREST OF THE *AMICUS CURIAE*

American Business Press ("ABP") is the association of the nation's leading business and trade magazines. Over 600 trade, scientific, professional, educational and other specialized periodicals circulated within the United States and throughout the world are published by ABP's members. Examples of ABP's member publications include the *American Journal of Medicine*, *Billboard*, *Heavy Duty Trucking*, *Industry Week*, *Iron Age*, *Medical Economics*, *Progressive Architecture*, *Pulp & Paper*, *Railway Age*, and *Ward's Auto World*.

Like the newspaper owned by Petitioner, these publications are sustained primarily by advertising. ABP periodicals receive income derived from a combination of paid subscriptions and advertising revenue like the Petitioner, or derived from a combination of paid subscriptions and requests received from readers interested in receiving the publication. All ABP publications develop their subscriber lists by focusing circulation efforts on a particular industry or profession.

ABP submits this brief in support of Petitioner to provide a practical example of why the decision of the Third Circuit should be reversed. Just as with the Petitioner's publication, subscriber lists of specialized journals have a readily determinable value and a limited useful life which can be distinguished from goodwill. As has been recognized by the Fifth Circuit in *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1253 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974), and by the Eighth Circuit in *Donrey, Inc. v. United States*, 809 F.2d 534, 536 (8th Cir. 1987), determinations about the deductibility of particular subscriber lists should be fact-specific. The ruling of the Third Circuit effectively establishes a *per se* rule which would preclude publishers from proving that their subscriber lists are intangible assets which have ascertainable value separate and distinct from goodwill.

SUMMARY OF ARGUMENT

Because the useful lives of specialized subscription lists can be determined, and because they can be valued, and because such lists are separate and distinct from goodwill, they should be allowed amortization, just as the Petitioner's list should be allowed amortization. Any other result would

overstate the true net income of the publications and would lead to unfair taxation.

ARGUMENT

I. INTRODUCTION

The business world is made up of distinct fields of endeavor, and the persons engaged in these fields require news and information to stay informed and in touch with the developments in their respective endeavors. Specialized business periodicals serve the purpose of disseminating that news and information. The editorial content of these periodicals is designed and written to be of interest and value to the people working in the particular field.

The publisher of the specialized periodical, through an extensive, and costly, process of research, identifies the key people in the field--those who should want to read the publication. These potential subscribers, once identified, are solicited to become subscribers to the publication. The subscription may be a paid subscription or it may be a request subscription with the subscriber filing with the publisher a detailed, signed request setting forth the reasons why the requestor should receive the periodical. [1] Specialized business

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[1] Under the Domestic Mail Classification Schedule established by the U.S. Postal Rate Commission pursuant to 39 U.S.C. § 3623, periodicals paid for or requested by more than fifty percent of their recipients qualify for second class mailing rates. *See* 39 C.F.R. Ch. III, Pt. 3001, Subpt. C, App. A, Sec. 200.010 through 200.0110 (1991). See also, Opinion and Recommended Decision, U.S. Postal Rate Commission, Docket No. R80-1 at 320-22 (Feb. 19, 1981).

periodicals are also circulated through a combination of paid and request subscriptions.

Subscription lists of all ABP member periodicals are always audited by the Audit Bureau of Circulation or Business Publications Audit, each of which audit both paid and request circulation to prevent circulation fraud.

Subscription lists can provide advertisers with some indication of the responsiveness of the readers to the publication, that is, whether the readers are in fact opening the publication and becoming exposed to the advertising inside. This can be shown through the length of time particular readers have subscribed to a periodical. If, year after year, a reader continues to subscribe to a periodical, this is a reliable and verifiable indication that the reader in fact values the contents of the publication.

II. SPECIALIZED PUBLICATION CIRCULATION LISTS ARE WASTING ASSETS WHICH CAN BE ACCURATELY VALUED, AND ARE SEPARATE AND DISTINCT FROM GOODWILL

An intangible asset like a specialized periodical circulation list can cost substantial sums to acquire. Once acquired, it begins to waste away. According to the test established in *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1251 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974), a taxpayer who has acquired such an asset and seeks to amortize it carries a dual burden of proving that the intangible asset involved (1) has an ascertainable value separate and distinct from goodwill, and (2) has a limited useful life, the duration of which can be ascertained with reasonable accuracy.

As recognized by both the district court and the Third Circuit in the instant case, the useful lives of subscriber lists can be determined with accuracy. Once a list is developed, predictable events will begin to deteriorate its usefulness at a rate that experts in the field can predict. For example, specialized periodical distribution is determined by job title. A list for a targeted publication is composed of occupational categories such as hospital administrators, plant managers, or sales executives, and as particular individuals move on to other positions or other companies, the list's accuracy will decrease unless replacement names of other qualified subscribers are found. In addition to the fact that the useful lives of specialized publication circulation lists can be determined, the value of the lists can also be determined on an case-by-case basis. In almost any situation, the costs incurred in developing the list are readily determinable.

In other situations, the fair market value of a list can be determined where there is a sufficient number of actual transactions, such as rentals, to determine a value. The lists can be used by book publishers to solicit sales of a new book, to announce, through direct mail advertising, an upcoming industry trade show or a seminar on a topic that will be of interest to the subscriber population, or it can be used to disseminate other services and information of value to subscribers, such as electronic data.

The important point is that the most appropriate valuation determination is dependent upon the factual situation in each case. The Third Circuit decision, however, would deprive publishers of the opportunity to establish a value for their subscriber lists in the context of their particular circumstances.

The Third Circuit erroneously adopted a *per se* rule that such lists are not depreciable, stating:

> Customer lists are generally not depreciable when acquired in conjunction with the sale of the underlying business as a going concern. In the context of the sale of a going concern, it is simply often too difficult for the taxpayer and the court to separate the value of the list *qua* list from the goodwill value of the customer relationships/structure.

Pet. App. at 29a. However, specialized business publication circulation lists are used to demonstrate the quality and attractiveness of a readership to advertisers and others who desire access to the readers. The real value of an accurate and well-targeted list, to borrow from the testimony of a witness in the *Donrey* litigation, is as a "machine" to generate advertiser or rental revenue. *See Donrey*, 809 F.2d at 536.

It was not too difficult for the jury below in the instant case and the juries in the *Houston Chronicle* and *Donrey* cases to make factual determinations of value. Factual determinations of value can be made, and by making these determinations income can be better determined and taxed.

CONCLUSION

Because specialized readership lists are wasting assets, with a determinable value separate from the goodwill of the publication, they should be allowed amortization subsequent to acquisition, as was recognized by the Fifth and Eighth Circuits. Any other result would result in an inaccurate determination of the true level of taxpayer income. The goal

of taxation is taxation of net income. If an asset, intangible or tangible, is wasting away, recognition of that fact better matches the income generated by the asset with the costs of producing the income from the asset. *See Detroit Edison Co. v. Commissioner*, 319 U.S. 98, 101 (1943); *Massey Motors, Inc. v. United States*, 364 U.S. 92, 104 (1960). The example of specialized publications demonstrates that the determination of how the amortization can best reflect the underlying economic realities is a fact-specific determination, not amenable to a *per se* rule that would unjustly prevent any consideration of the value of subscriber lists.

Respectfully submitted,

ROBERT A. SALTZSTEIN
Counsel of Record
STEPHEN M. FELDMAN
DAVID R. STRAUS
SPIEGEL & MCDIARMID
1350 New York Avenue
Suite 1100
Washington, D.C. 20005-4798
(202) 879-4000
Counsel for American Business Press

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